(4) (3)

Nos. 95-966, 95-977

Supreme Court, U.S.
FILED
MAY 7 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE, minors,

Petitioners,

-and-

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

LINDA D. KING
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PETITION FOR CERTIORARI OF KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE, MINORS FILED DECEMBER 19, 1995

PETITION FOR CERTIORARI OF KELLY M. O'GILVIE FILED DECEMBER 21, 1995

CERTIORARI GRANTED, AND PETITIONS CONSOLIDATED, MARCH 25, 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Appendix S — Letter from IRS to Kevin O'Gilvie Allowing Refund Dated June 6, 1990	78a
Appendix T — Copy of Refund Checks	79a
Appendix U — Supersedeas Bond Filed January 15, 1988	81a

The following opinions, judgments, memoranda and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix of one or both of the printed Petitions for Certiorari:

Opinion of the Court of Appeals for the Tenth Circuit dated September 19, 1995:

Petition of Kelly M. O'Gilvie A1

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 1a

Judgment of the Court of Appeals for the Tenth Circuit dated October 18, 1995:

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 23a

Judgment of the District Court of Kansas Dated May 26, 1992:

Petition of Kelly M. O'Gilvie A25

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 26a

Memorandum and Order of the District Court of Kansas dated August 26, 1992:

Petition of Kelly M. O'Gilvie A26

Petition of Kevin M. O'Gilvie and Stephanie L. O'Gilvie 25a

Judgment of the District Court of Kansas dated August 26, 1992:

Petition of Kelly M. O'Gilvie A29

Order of the District Court of Kansas dated August 27, 1992:

Petition of Kelly M. O'Gilvie A30

Memorandum and Order of the District Court of Kansas dated November 30, 1993:

Petition of Kelly M. O'Gilvie A31

Judgment of the District Court of Kansas dated November 30, 1993:

Petition of Kelly M. O'Gilvie A37

Amended Judgment of the District Court of Kansas dated December 7, 1993:

Petition of Kelly M. O'Gilvie A38

APPENDIX A — DOCKET ENTRIES

DOCKET ENTRIES FOR KELLY O'GILVIE

U.S. District Court
U.S. District Court for the District of Kansas (Wichita)

CIVIL DOCKET FOR CASE #: 90-CV-1075

Filed: 02/13/90

Nature of Suit: 870
Jurisdiction: US Defendant

O'Gilvie v. USA
Assigned to: Judge Monti L. Belot
Demand: $695,000
Lead Docket: None
Dkt # in 10CCA: is: 94- -03031
Dkt # in 10CCA: is: 94- -03004

Cause: 26:7422 IRS: Refund Taxes

KELLY M. O'GILVIE
plaintiff

Linda D. King
[COR LD NTC]
6135 East Central
P.O. Box 8085
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316-686-2000
FTS 686-1818

Appendix A

John C. King
[term 08/02/93]
[COR LD NTC]
Law Office of John C. King, Ltd.
260 North Rock Road — Ste. 128
P.O. Box 782106
Wichita, KS 67278
316-682-3000

v.

UNITED STATES OF AMERICA
defendant

Noreene C Stehlik
202-514-6489
[COR LD NTC]
Office of Special Litigation
Tax Division
U.S. Department of Justice
P.O. Box 7238 - Ben Franklin Station
Washington, DC 20044

2/13/90	1	COMPLAINT; Summons(es) issued (case referred to Magistrate John T. Reid) (ckr) [Entry date 09/25/90]
2/13/90	—	SUMMONS issued (ckr) [Entry date 09/25/90]
2/13/90	—	FILING FEE PAID: on 2/13/90 in the amount of $120.00, receipt #78332. (ckr) [Entry date 09/25/90]

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2/21/90	2	RETURN OF SERVICE executed upon defendant USA on 2/21/90 (ckr) [Entry date 09/25/90]
4/23/90	3	ANSWER by defendant, re: [1-1] (ckr) [Entry date 09/25/90]
9/27/90	4	MOTION by defendant for Scheduling Order cc: Mag Reid (ckr)
10/1/90	5	SCHEDULING ORDER ENTERED: Magistrate John T. Reid; Pretrial Conference set for 2:00 pm on 3/29/91; Discovery ddl set for 2/1/91; Dispositive Mtn ddl 3/15/91 (cc: all counsel) (jb) [Entry date 10/02/90]
12/18/90	6	Proposed WITNESS LIST submitted by defendant (ckr)
12/19/90	7	PROPOSED WITNESS & EXHIBIT LIST submitted by plaintiff (ckr) [Entry date 12/20/90]
2/1/91	8	MOTION by plaintiff to amend pleadings, cc: Magistrate Reid (ckr) [Entry date 02/04/91]
2/28/91	9	ORDER ENTERED: by Magistrate John T. Reid granting motion to amend pleadings [8-1] (cc: all counsel) (ckr)
3/1/91	10	MOTION by plaintiff to extend dispositive motion deadlines, cc: Magistrate Reid w/Order (ckr) [Entry date 03/04/91]

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3/11/91	11	MOTION by defendant to continue Pretrial Conference, cc: Magistrate Reid w/Order (ckr) [Entry date 03/12/91]
3/13/91	12	ORDER ENTERED: by Magistrate John T. Reid granting motion to extend dispositive motion deadlines [10-1] and granting motion to continue Pretrial Conference [11-1]; Dispositive MTN ddl 4/15/91; Plaintiff shall file amendment on or before 3/15/91 or within 10 days of receipt of such disallowance to include additional overpayment; Pretrial conference continued to 4/29/91 at 2 p.m. (cc: all counsel) (ckr) [Entry date 03/14/91]
4/12/91	13	MOTION by USA for summary judgment, referred to Judge Monti L. Belot (ckr) [Edit date 04/22/92]
4/12/91	14	CERTIFICATE of service of motion for summary judgment by defendant (ckr)
4/15/91	15	MOTION by plaintiff for summary judgment referred to Judge Monti L. Belot (ckr) [Entry date 04/16/91] [Edit date 04/22/92]
4/16/91	16	MEMORANDUM in support by plaintiff of motion for summary judgment referred to Judge Sam A. Crow [15-1] (ckr)
5/6/91	18	MEMORANDUM in opposition by plaintiff re: Defendant's Cross-motion for summary judgment, referred to Judge Sam A. Crow [13-1] (lkl) [Entry date 05/07/91]

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5/7/91	17	RESPONSE by defendant to Plaintiff's motion for summary judgment referred to Judge Sam A. Crow [15-1] (lkl)
5/14/91	19	UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF re: motion for summary judgment, referred to Judge Sam A. Crow [13-1] cc: Judge Crow (lkl)
5/16/91	20	REPLY MEMORANDUM by plaintiff re: motion response [17-1] to his motion for summary judgment cc: Judge Crow (lkl) [Entry date 05/17/91]
5/22/91	21	PRE-TRIAL ORDER ENTERED by Judge Sam A. Crow: Terminating case referral of Magistrate Judge John T. Reid discovery is complete & case is ready for trial trial in Wichita to court ETT: 1 days. Prospects for settlement are poor. 6 pages (cc: all counsel) (lkl)
8/22/91	22	AMENDED COMPLAINT [1-1] — by plaintiff (lkl) [Entry date 08/23/91]
9/10/91	23	ANSWER — by defendant to amended complaint [22-1] (lkl)
1/15/92	24	MINUTE ORDER — ENTERED: by Clerk Case reassigned to Judge Monti L. Belot (cc: all counsel) (bt) [Entry date 01/16/92]
4/23/92	25	AMENDED FINAL PRETRIAL CONFERENCE ORDER ENTERED: by Judge

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Monti L. Belot re [21-1] due to plaintiff amending his complaint. If a trial is required, the case will be tried at Wichita to the Court. Estimated trail time is 1 day with prospects for settlement poor. (cc: all counsel) (vlw) [Entry date 04/24/92]

5/26/92 26 MEMORANDUM AND ORDER: by Judge Monti L. Belot granting motion for summary judgment filed by the defendant [13-1] terminating case 10 pages (cc: all counsel) (bt)

5/26/92 27 JUDGMENT IN A CIVIL CASE ENTERED: Judgment is granted deft in granting their motion for s/j (cc: all counsel) (bt)

6/5/92 28 MOTION by plaintiff Kelly M O'Gilvie for reconsideration referred to Judge Monti L. Belot (vlw)

6/5/92 29 MEMORANDUM/BRIEF in support by plaintiff Kelly M O'Gilvie re: motion for reconsideration referred to Judge Monti L. Belot [28-1] (vlw)

6/23/92 30 MOTION by defendant USA to extend time until 7/6/92 to file its opposition to pltf's motion for reconsideration of judgment referred to Judge Monti L. Belot (vlw) [Entry date 06/24/92]

06/26/92 31 ORDER ENTERED: by Senior Judge Frank G. Theis granting aft's motion to extend time until

		7/6/92 to file its opposition to pltf's motion for reconsideration of judgment [30-1] (cc: all counsel) (vlw)
7/6/92	32	RESPONSE in OPPOSITION and MEMORANDUM IN SUPPORT OF OPPOSITION by defendant USA to pltf's motion for reconsideration referred to Judge Monti L. Belot [28-1] (vlw) [Entry date 07/07/92]
8/26/92	33	MEMORANDUM AND ORDER: by Judge Monti L. Belot granting pltf's motion for reconsideration [28-1] and sustaining pltf's motion for summary judgment [15-1] 3 pages (cc: all counsel) (vlw)
8/26/92	34	JUDGMENT ENTERED by the Clerk: pursuant to the Memorandum and Order filed and entered on the docket on 8/26/92 [33-1] granting the plaintiff's motion for reconsideration (Dkt. 28) and sustaining plaintiff O'Gilvie's motion for summary judgment (Dkt. 15) (cc: all counsel) (vlw)
10/26/92	35	NOTICE OF APPEAL by defendant USA from Dist. Court decision re: [33-1] (cc: all counsel, 10CCA: (adw) [Entry date 10/27/92]
10/26/92	—	APPEAL FEE STATUS: $105.00 appeal filing fee waived, U.S. Appellant (adw) [Entry date 10/27/92]

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10/27/92	36	ORDER ENTERED: by Judge Monti L. Belot vacating [34-1] judgment (cc: all counsel) (bt)
10/30/92	37	NOTICE by defendant USA of withdrawl of appeal (cc: USCA) (adw) [Entry date 11/02/92]
11/2/92	38	LETTER to 10CCA stating notice of withdrawl of appeal filed 10/30/92, counsel advised notice should also be filed with USCA re: (adw)
11/3/92	39	RECEIPT FROM USCA of preliminary record rec'd 11/3/92 re: appeal [35-1] (adw)
11/3/92	40	APPEAL DOCKETED in 10th Circuit on 10/30/92 and assigned Dkt No. 92-3403 (adw)
11/10/92	42	MEMORANDUM/BRIEF in support by plaintiff re: motion for summary judgment referred to Judge Monti L. Belot [41-1] (bt) [Entry date 11/12/92]
11/11/92	41	MOTION by plaintiff for summary judgment referred to Judge Monti L. Belot (bt) [Entry date 11/12/92]
11/16/92	43	MANDATE, 10CCA: dismissing the appeal on appellant's motion to dismiss [35-1] (cc: all counsel) (adw)
11/30/92	44	MOTION by defendant USA for summary judgment referred to Judge Monti L. Belot (ckr)
3/29/93	45	MEMORANDUM/BRIEF in support by

		defendant USA re: motion for summary judgment referred to Judge Monti L. Belot [44-1] (bt)
5/18/93	46	MOTION by plaintiff Kelly M O'Gilvie for leave to file reply out of time referred to Judge Monti L. Belot (bt)
5/18/93	47	SUPPLEMENT by plaintiff Kelly M O'Gilvie re: motion for summary judgment referred to Judge Monti L. Belot [41-1] (bt)
5/19/93	48	REPLY by plaintiff Kelly M O'Gilvie to response to motion for summary judgment referred to Judge Monti L. Belot [41-1] (bt)
5/19/93	49	MEMORANDUM/BRIEF in support by plaintiff Kelly M O'Gilvie re: motion reply [48-1] (bt)
5/27/93	50	MOTION by plaintiff Kelly M O'Gilvie to certify discharge of attorney referred to Judge Monti L. Belot (bt)
6/3/93	51	NOTICE of hearing; In-court hearing on motion to certify discharge of atty set for 6/14/93 at 1:30 pm (cc: all counsel) (bt) [Entry date 06/04/93]
6/22/93	52	MOTION by counsel King for plaintiff Kelly M O'Gilvie to withdraw attorney referred to Judge Monti L. Belot (bt) [Entry date 06/23/93]

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6/22/93	53	NOTICE by counsel John King for plaintiff Kelly M O'Gilvie of attorney's lien (bt) [Entry date 06/23/93]
7/2/93	54	ACCEPTANCE/ACKNOWLEDGMENT OF SERVICE by defendant USA on 6/23/93 (bt)
7/7/93	55	RESPONSE by defendant USA to motion to withdraw attorney referred to Judge Monti L. Belot [52-1] (bt) [Entry date 07/09/93]
7/7/93	56	CERTIFICATE of service of response to motion to withdraw by defendant USA (bt) [Entry date 07/09/93]
7/19/93	57	MEMORANDUM/BRIEF in support by plaintiff Kelly M O'Gilvie re: notice [53-1] (bt) [Entry date 07/20/93]
7/20/93	58	NOTICE of hearing; In-court hearing on motion to withdraw set for 8/2/93 at 10:00 am before Judge Belot (cc: all counsel) (bt)
7/20/93	59	ORDER ENTERED: by Judge Monti L. Belot granting pltf's motion for leave to file reply out of time [46-1] (cc: all counsel) (bt)
8/2/93	60	MINUTE SHEET: Wichita — granting motion to certify discharge of attorney [50-1] granting motion to withdraw attorney [52-1] attorney John C. King for Kelly M O'Gilvie (bt) [Entry date 08/03/93]

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10/6/93	61	ORDER ENTERED: by Judge Monti L. Belot withdrawing attorney John King as counsel for pltf effective 8/2/93 (cc: all counsel) (bt)
11/30/93	62	MEMORANDUM AND ORDER: by Judge Monti L. Belot granting deft's motion for summary judgment and holding that the "addl amt" on $8.65 million from the date of the court's entry of remittitur to the court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income [44-1] terminating case 6 pages (cc: all counsel) (bt)
11/30/93	63	JUDGMENT IN A CIVIL CASE ENTERED by Clerk granting the motion for s/j filed by the defendant (cc: all counsel) (bt)
12/7/93	64	AMENDED JUDGMENT ENTERED by Clerk amending judgment entered to reflect previous order (cc: all counsel) (bt)
1/5/94	65	NOTICE OF APPEAL by plaintiff Kelly M O'Gilvie from Dist. Court decision re: (cc: all counsel, 10CCA: (adw) [Entry date 01/06/94]
1/5/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee paid Receipt # 6498 (adw) [Entry date 01/06/94]
1/14/94	66	RECEIPT FROM USCA of preliminary record rec'd 1/12/94 re: appeal [65-1] (adw) [Entry date 01/18/94]

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1/14/94	67	APPEAL DOCKETED in 10th Circuit on 1/12/94 and assigned Dkt No. 94-3004 (adw) [Entry date 01/18/94]
1/19/94	68	TRANSCRIPT ORDER FORM of appellant re [65-1] transcript not necessary for this appeal; (adw)
1/19/94	69	LETTER to 10CCA stating record is complete for purpose of appeal (cc: counsel) (adw)
2/1/94	70	NOTICE OF CROSS-APPEAL by defendant USA from Dist. Court decision re: [64-1] (cc: all counsel, 10CCA: (adw) [Entry date 02/02/94]
2/1/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee not paid, US appeal (adw) [Entry date 02/02/94]
2/1/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee re: [70-1] re appeal [70-1] paid Receipt # 6498 (dw) [Entry date 01/24/95]
2/16/94	71	RECEIPT FROM USCA of preliminary record rec'd 2/11/94 re: [70-1] (adw) [Entry date 02/18/94]
2/16/94	72	APPEAL DOCKETED in 10th Circuit on 2/11/94 re: [70-1] and assigned Dkt No. 94-3031 (adw) [Entry date 02/18/94]
3/2/94	73	LETTER from 10CCA stating possible jurisdictional defect in appeals re: [70-1], re: [65-1] (adw) [Entry date 03/03/94]

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1/29/96	74	LETTER from USCA regarding Writ of Certiorari filed 12-21-95 and assigned Supreme Court No. 95-977. [70-1] & [65-1] (bs) [Entry date 01/30/96]
4/4/96	75	Letter from 10CCA stating writ of certiorari was granted by order on 3-25-96. [70-1] [65-1] (bs) [Entry date 04/06/96]

Appendix A

DOCKET ENTRIES FOR KEVIN M. O'GILVIE AND STEPHANIE L. O'GILVIE

REOPEN REFER

U.S. District Court
U.S. District Court for the District of Kansas (Wichita)

CIVIL DOCKET FOR CASE #: 92-CV-1358

Filed: 07/09/92

Nature of Suit: 870
Jurisdiction: US Plaintiff

USA v. O'Gilvie, et al
Assigned to: Judge Monti L. Belot
Demand: $784,000
Lead Docket: None
Dkt # in 10CCA: is: 94 - - 03058

Cause: 26: 7422 IRS: Refund Taxes

UNITED STATES OF AMERICA
plaintiff

Noreene C Stehlik
202-514-6489
[COR LD NTC]
Office of Special Litigation
Tax Division
U.S. Department of Justice
P.O. Box 7238 — Ben Franklin
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Washington, DC 20044

Appendix A

Rachel D Cramer
[COR LD NTC]
U.S. Department of Justice
Office of Special Litigation —
Tax Div.
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044

v.

KEVIN M O'GILVIE
defendant

Linda D. King
[COR LD NTC]
6135 East Central
P.O. Box 8085
Wichita, KS 67208
316-686-2000
FTS 686-1818

John C. King
[term 07/30/93]
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Law Office of John C. King,
Ltd.
260 North Rock Road — Ste. 128
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Wichita, KS 67278

Appendix A

STEPHANIE L O'GILVIE
defendant

Linda D. King
(See above)
[COR LD NTC]

John C. King
[term 07/30/93]
(See above)
[COR LD NTC]

7/9/92	1	COMPLAINT w/designation of place of trial — Wichita; Summons(es) issued (bt)
7/9/92	—	FILING FEE waived — US Government (bt)
8/26/92	2	RETURN OF SERVICE executed on 8/25/92 on conservator of the estate (bt) [Entry date 08/27/92]
8/26/92	3	RETURN OF SERVICE executed on 8/25/92 to Ralph Pitts (bt) [Entry date 08/27/92]
8/26/92	4	RETURN OF SERVICE executed upon defendant Stephanie L O'Gilvie on 8/26/92 (bt) [Entry date 08/27/92]
8/26/92	5	RETURN OF SERVICE executed upon defendant Kevin M O'Gilvie on 8/26/92 (bt) [Entry date 08/27/92]

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9/10/92	6	ATTORNEY APPEARANCE for defendant Stephanie L O'Gilvie by John C. King (bt)
9/10/92	7	ATTORNEY APPEARANCE for defendant Kevin M O'Gilvie by John C. King (bt)
10/16/92	8	ATTORNEY APPEARANCE for defendant Kevin M O'Gilvie by Linda D. King (bt) [Entry date 10/19/92]
10/16/92	9	ATTORNEY APPEARANCE for defendant Stephanie L O'Gilvie by Linda D. King (bt) [Entry date 10/19/92]
2/19/93	10	MOTION by defendants to dismiss and or in the alternative to quash service of summons referred to Chief Judge Patrick F. Kelly (bs)
2/19/93	11	MEMORANDUM in support of motion by defendants to dismiss [10-1] or in the alternative to quash service of summons referred to Chief Judge Patrick F. Kelly [10-2] (bs)
3/16/93	12	OBJECTIONS by plaintiff USA to motion by defendants to dismiss referred to Chief Judge Kelly [10-1] (bs)
3/29/93	13	REPLY by defendants to response by USA to motion by defendants to dismiss referred to Chief Judge Kelly [10-1] (bs) [Entry date 03/30/93]

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3/30/93	—	AMENDED REPLY by defendants to the response of USA to Motion to Dismiss [13-1] (bs) [Entry date 03/31/93]
3/30/93	14	AMENDED REPLY by Defendants to response by USA to motion by defendants to dismiss. (original reply missing two pages no other changes have been made) referred to Chief Judge Kelly. [10-1] (bs) [Entry date 03/31/93]
6/25/93	15	MEMORANDUM AND ORDER by Chief Judge Patrick F. Kelly: denying motion by defendants to dismiss [10-1] based on unsatisfactory service of process [10-2] 5 pages (cc: all counsel) (ckr) [Entry date 06/28/93]
7/19/93	16	MEMORANDUM ORDER: by Chief Judge Patrick F. Kelly Case reassigned to Judge Monti L. Belot (cc: all counsel) (bs)
7/21/93	17	MOTION by defendants for extension of time to file answer referred to Chief Judge Patrick F. Kelly (bs) [Entry date 07/22/93]
7/21/93	18	MOTION by John King, attorney for Defts to withdraw attorney referred to Judge Monti L. Belot (bs) [Entry date 07/22/93]
7/22/93	19	ORDER ENTERED: by Judge Monti L. Belot granting motion by defendants for extension of time to file answer within 10 days of the entry of this order [17-1] (cc: all counsel) (bs)

7/26/93	20	RESPONSE by plaintiff USA to motion by John King, attorney for Defts to withdraw attorney referred to Judge Monti L. Belot [18-1] (bs)
7/30/93	21	ORDER ENTERED: by Judge Monti L. Belot granting motion by John King, attorney for Defts to withdraw as counsel [18-1] (cc: all counsel) (bs)
8/20/93	22	STIPULATION and ORDER ENTERED: by Judge Monti L. Belot, counsel for defendants and counsel for US. (cc: all counsel) (bs) [Entry date 08/23/93]
9/10/93	23	MOTION by defendants to extend time to answer referred to Judge Monti L. Belot w/order. (bs)
9/10/93	24	ANSWER by defendants to complaint [1-1] (bs)
9/14/93	25	ORDER ENTERED: by Judge Monti L. Belot granting motion by defendants to extend time to answer within five days of the entry of this order [23-1] (cc: all counsel) (bs)
2/2/94	26	JUDGMENT WITHDRAWN (ckr) [Edit date 02/04/94]
2/4/94	27	MINUTE ORDER — ENTERED by Clerk: withdrawing judgment from the file [26] (cc: all counsel) (ckr)

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2/22/94	28	ORDER ENTERED: by Judge Monti L. Belot that the pltf will take nothing on its complaint against defts and the action is dismissed on the merits (cc: all counsel) (bt)
3/4/94	29	NOTICE OF APPEAL by plaintiff USA from Dist. Court decision re: [28-1] (cc: all counsel, 10CCA: (adw)
3/4/94	—	APPEAL FEE STATUS: $105.00 appeal filing fee waived, US Appeal (adw)
3/15/94	30	RECEIPT FROM USCA of preliminary record rec'd 3/7/94 re: [29-1] (mjm) [Edit date 03/15/94]
3/15/94	31	APPEAL DOCKETED in 10th Circuit on March 10, 1994 re: [29-1] and assigned Dkt No. 94-3058 (mjm)
3/15/94	32	TRANSCRIPT ORDER FORM of appellant re [29-1] A transcript is not necessary for this appeal filed by plaintiff (mjm)
3/16/94	33	LETTER to 10th Circuit Court of Appeals stating record is complete for purpose re: [29-1] (mjm)
10/18/95	34	MANDATE, 10CCA: reversing and remanding the Decision of the District Court for further proceedings in accordance with the opinion of this court re: [29-1] (cc: Judge Belot) (adw)

Appendix A

10/24/95	35	Statement of costs by USCA for plaintiff USA in the amount of $116.56 (cc: all counsel) (adw) [Entry date 10/25/95]
1/29/96	36	LETTER from USCA regarding Writ of Certiorari filed 12-29-95 and assigned Supreme Court No. 95-966. (bs) [Entry date 01/30/96]
4/4/96	37	Letter from 10CCA stating writ of certiorari was granted by an order on 3-25-96. (bs) [Entry date 04/06/96]

APPENDIX B — COMPLAINT FILED FEBRUARY 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

COMES NOW the Plaintiff, Kelly M. O'Gilvie, one of three intestate heirs of the Estate of Betty O'Gilvie, by and through his attorneys, John C. King and Linda D. King and states:

Jurisdiction and Venue

1. This action is instituted pursuant to, and jurisdiction arises under, 28 U.S.C. 1346(a)(1) and 26 U.S.C. 6532(a)(1) and 7422(a), for the recovery of income tax and interest erroneously, illegally, wrongfully or excessively assessed and collected from Plaintiff.

2. Plaintiff, Kelly M. O'Gilvie, is an individual residing in Benton, Kansas and within the District of Kansas. Plaintiff's late wife, Betty O'Gilvie, resided in Sedgwick County, Kansas at the

time of her death. Betty O'Gilvie's estate was administered in the District Court, Probate Department, Sedgwick County, Kansas.

3. Defendant, United States of America, may be sued within this district pursuant to 28 U.S.C. 1391(e).

4. On 2 April 1983, Plaintiff's wife, Betty O'Gilvie, died as a result of toxic shock syndrome. Kelly O'Gilvie in his individual capacity, as the natural guardian of Kevin and Stephanie O'Gilvie, their children, and as the administrator of the Estate of Betty O'Gilvie, sued Playtex International, Inc. in the United States District Court for the District of Kansas for wrongful death and for his late wife's conscious pain and suffering. The case was tried to a jury.

5. The jury returned a verdict for pecuniary and nonpecuniary damages, which amounts were excluded from the income of the recipients by virtue of IRC 104(a)(2). The jury also awarded damages for conscious pain and suffering in the amount of two hundred thousand dollars ($200,000.00) and punitive damages to the Estate of Betty O'Gilvie in the amount of ten million dollars ($10,000,000.00). Judgment was entered on the verdict and affirmed on appeal.

6. On 13 June 1989, Plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie, caused the estate's 1988 income tax return Form 1041 to be filed with the Internal Revenue Service at Austin, Texas. This Form 1041 included $4,967,292.00 as gross income representing the punitive damage award, net of attorney's fees and case expenses received in 1988 from Playtex International, Inc.

7. On 4 August 1989, Plaintiff, Kelly M. O'Gilvie, in his

individual capacity as an intestate heir of the Estate of Betty O'Gilvie included in his gross income the amount of $2,483,646.00 as his intestate share of such punitive damage award. IRC 662(b).

8. When it was determined that the punitive damage award was either not gross income or was excludable form gross income under 26 U.S.C. 104(a)(2), Plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie and in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, on filed on 9 August 1989 an amended Form 1041 for the Estate of Betty O'Gilvie and a Form 1040X for himself reporting thereon a net decrease in gross income in the amounts of $4,967,292.00 and $2,283,646.00, respectively. The decrease in gross income results in the overpayment of income tax by Kelly M. O'Gilvie in his individual capacity of $695,415.00. Kelly M. O'Gilvie, in his individual capacity, requests a refund in that amount plus interest.

9. More than six (6) months have elapsed since the filing of the amended Form 1041 and the Form 1040X and the Secretary of the Treasury has not rendered a decision thereon. Plaintiff is therefore entitled to bring this action. 26 U.S.C. 6532(a).

10. Plaintiff, Kelly M. O'Gilvie, has overpaid his federal income tax in the amount of $695,415.00 which amount, together with interest as provided by law on overpayments, is due and owing to Plaintiff from Defendant.

11. Plaintiff, Kelly M. O'Gilvie, administrator of the Estate of Betty O'Gilvie, elected under IRC 661(a)(2) and 662(a)(2)(B) to consider the payments from the Estate of Betty O'Gilvie as payments to the intestate heirs of the items directly. Accordingly,

the Estate of Betty O'Gilvie deducted on its Form 1041 the amounts which it paid to the intestate heirs. The Estate of Betty O'Gilvie showed no tax on its original Form 1041 or on its amended Form 1041.

12. Attached hereto is a copy of Plaintiff's 1988 Form 1040X.

13. The action of Defendant, through the Secretary of the Treasury, in refusing to refund income tax overpaid by Plaintiff was erroneous, illegal, wrongful or excessive.

14. No assignment or transfer has been made regarding any part of Plaintiff's claim.

WHEREFORE, Plaintiff prays that judgment be entered in his favor in the amount of $695,415.00, together with interest as provided by law on the overpayment and the costs of this action.

s/ John C. King
John C. King #13827

s/ Linda D. King
Linda D. King #13004
King & King, P.A.
6135 East Central
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000

Appendix B

John C. King is
Of Counsel to
Martin, Pringle, Oliver,
Wallace & Swartz
300 Page Court
220 W. Douglas
Wichita, Kansas 67202-3194
(316) 265-9311

Form **1040X** (Rev. October 1988)

Department of the Treasury – Internal Revenue Service

Amended U.S. Individual Income Tax Return

OMB No. 1545-0091
Expires 9-30-90

This return is for calendar year ▶ 1988 , OR fiscal year ended ▶ , 19 .

PRINT OR TYPE

Your first name and initial (if joint return, also give spouse's name and initial) Last name
Kelly M. O'Gilvie

Your social security number
514-70-2944

Present home address (number, street, apt. no. or rural route) (If you have a P.O. Box, see instructions)
c\o John C. King P.O. Box 8085

Spouse's social security number
Unknown

City, town or post office, state, and ZIP code
Wichita, KS 67208-0085

Telephone number (optional)
316-686-2000

Taxpayer Service Group RECEIVED AUG 11 1989 I.R.S. Wichita, Kansas

Enter below name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses used on original returns. (Note: You cannot change from joint to separate returns after the due date has passed.)

SAME

A Service center where original return was filed
Austin, Texas

B Has original return been changed or audited by IRS? ..... ☐ Yes ☒ No
If "No," have you been notified that it will be? ..... ☐ Yes ☒ No
If "Yes," identify IRS office ▶

C Are you amending your return to include any item (loss, credit, deductions, other tax benefit, or income) relating to a tax shelter required to be registered? ..... ☐ Yes ☒ No
If "Yes," you MUST attach Form 8271 Investor Reporting of Tax Shelter Registration Number.

D Filing status claimed. (Note: You cannot change from joint to separate returns after the due date has passed.)
On original return .. ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of Household ☐ Qualifying widow(er)
On this return ..... ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of Household ☐ Qualifying widow(er)

Income and Deductions (see instructions)		A. As originally reported or as adjusted (see instructions)	B. Net change—increase or (decrease)—explain on page 2	C. Correct amount
1 Total income	1	3426018	-2483646	942372
2 Adjustments to income	2			
3 Adjusted gross income (subtract line 2 from line 1)	3	3426018	-2483646	942372
4 Deductions	4	2500		2500
5 Subtract line 4 from line 3	5	3423518	-2483646	939872
6 Exemptions	6	5850		5850
7 Taxable income (subtract line 6 from line 5)	7	3417668	-2483646	934022
8 Tax (see instructions). (Method used in col. C TAX RATE SCHED.)	8	961065	-695421	265644
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10	961065	-695421	265644
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 Total tax liability (add lines 10 and 11)	12	961065	-695421	265644
13 Federal income tax withheld and excess FICA and RRTA tax withheld	13	58		58
14 Estimated tax payments	14	720000		720000
15 Earned income credit	15			
16 Credit for Federal tax on fuels, regulated investment company, etc.	16			
17 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)	17			250000
18 Amount paid with original return, plus additional tax paid after it was filed	18			
19 Add lines 13 through 18, column C	19			970058
Refund or Amount You Owe				
20 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)	20			
21 Subtract line 20 from line 19 (see instructions)	21			970058
22 AMOUNT YOU OWE. If line 12, col. C, is more than line 21, enter difference. Please pay in full with this return	22			
23 REFUND to be received. If line 12, column C, is less than line 21, enter the difference	23			704414

Please Sign Here

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Your signature: Kelly M. O'Gilvie Date: 8-10-89

Spouse's signature (if joint return, BOTH must sign) Date

Paid Preparer's Use Only

Preparer's signature: [signature] Date: 8-10-89 Check if self-employed ☐ Preparer's social security no.

Firm's name (or yours if self-employed) and address: King & King, P.A. Attorneys
6135 E. CENTRAL P.O. BOX 8085
WICHITA, KS

E.I. No. 48-1058433
ZIP code 67208

For Paperwork Reduction Act Notice, see page 1 of separate instructions.

BE SURE TO COMPLETE PAGE 2

orm 1040X (Rev. 10-88)

Part I **Exemptions (see Form 1040 or Form 1040A Instructions)**

If you are not changing your exemptions, do no complete Part I.
If claiming more exemptions, complete lines 1-6 and, if applicable line 8.
If claiming fewer exemptions, complete lines 1-7.

		A. Number originally reported	B. Net change	C. Correct number
For tax years beginning after 1986 – yourself and spouse	1	1		1
Caution: For tax years beginning after 1986, if someone (such as your parent) can claim you as a dependent, you cannot claim an exemption for yourself. For tax years beginning before 1987 – yourself and spouse, 65 or over, blind	2			
Your dependent children who lived with you	3	2		2
Your dependent children who did not live with you due to divorce or separation	4			
Other dependents	5			
Total exemptions (add lines 1 through 5)	6	3		3
Multiply $1,850 ($1,900, for tax year 1987, $1,080, for tax year 1986, $1,040, for tax year 1985) by the number of exemptions claimed on line 6. Enter the result here and on page 1, line 6	7	5850		5850

Dependents (children and other) not claimed on original return:
Note: Complete column (b) or (c), whichever applies, only if amending your 1987 or 1988 return.

(a) Full name (first, initial, and last name)	(b) Check if under age 5	(c) If age 5 or over, dependent's social security number	(d) Relationship	(e) No of months lived in your home

No. of children on 6 who lived with you ▶ ☐

No. of your children on 6 who didn't live with you due to divorce or separation (see instructions) ▶ ☐

No. of other dependents listed on 6 ▶ ☐

If your child listed on line 6 didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

Part II **Explanation of Changes to Income, Deductions, and Credits**

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback, a general business credit carryback, or, for tax year 1985, a research credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the instructions. Also, check here ▶ ☐

The taxpayer reported $2,483,646.00, which was his intestate share of a punitive damage award received on account of personal injury. The taxpayer contends that the amount is not taxable and should not have been included in gross income.

The award is either not income under Section 61 of the Internal Revenue Code of 1986, as amended, or is excluded from income under Section 104(a)(2) of Part III of Subchapter B, Chapter 1, Subtitle A of the Internal Revenue Code of 1986. Burford v. U.S., 642 F. Supp. 635 (1986).

Part III **Presidential Election Campaign Fund**

Checking below will not increase your tax or reduce your refund.

You did not previously want to have $1 go to the fund, but now want to ..... check here ▶ ☐
Joint return and spouse did not previously want to have $1 go to the fund, but now wants to ..... check here ▶ ☐

APPENDIX C — AMENDED COMPLAINT FILED AUGUST 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

COMES NOW the Plaintiff, Kelly M. O'Gilvie, one of three intestate heirs of the Estate of Betty O'Gilvie, by and through on of his attorneys, King & King, P.A., and pursuant to leave of court first had and obtained to amend his complaint states:

Jurisdiction and Venue

1. This action is instituted pursuant to, and jurisdiction arises under, 28 U.S.C. 1346(a)(1) and 26 U.S.C. 6532(a)(1) and 7422(a), for the recovery of income tax and interest erroneously, illegally, wrongfully or excessively assessed and collected from Plaintiff.

2. Plaintiff, Kelly M. O'Gilvie, is an individual residing in

Benton, Kansas and within the District of Kansas. Plaintiff's late wife, Betty O'Gilvie, resided in Sedgwick County, Kansas at the time of her death. Betty O'Gilvie's estate was administered in the District Court, Probate Department, Sedgwick County, Kansas.

3. Defendant, United States of America, may be sued within this district pursuant to 28 U.S.C. 1391(e).

Count I

4. On 2 April 1983, Plaintiff's wife, Betty O'Gilvie, died as a result of toxic shock syndrome. Kelly M. O'Gilvie in his individual capacity, and as the natural guardian of Kevin and Stephanie O'Gilvie, sued Playtex International, Inc. in the United States District Court for the District of Kansas for wrongful death and for his late wife's conscious pain and suffering. The case was tried to a jury.

5. In 1985 the jury returned a verdict for the Plaintiff's in their individual capacities for pecuniary and nonpecuniary damages, which amounts were excluded from the income of the recipients under 26 U.S.C. 104(a)(2). The jury also awarded damages for conscious pain and suffering in the amount of two hundred thousand dollars ($200,000.00) and punitive damages to the Estate of Betty O'Gilvie in the amount of ten million dollars ($10,000,000.00). The award, net of attorney's fees and expenses, was paid in 1988.

6. On 13 June 1989, Plaintiff, Kelly M. O'Gilvie , as administrator of the Estate of Betty O'Gilvie, caused the estate's 1988 income tax return Form 1041 to be filed with the Internal Revenue Service at Austin, Texas. This Form 1041 included $4,967,292.00 as gross income representing the punitive

damage award, net of attorney's fees and case expenses, received in 1988 from Playtex International, Inc.

7. On 4 August 1989, Plaintiff, Kelly M. O'Gilvie, in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, included in his gross income the Amount of $2,483,646.00 as his intestate share of such punitive damage award. 26 U.S.C. 662(b).

8. When it was determined that the punitive damage award was either not gross income or was excludible from gross income under 26 U.S.C. 104(a)(2), Plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie and in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, filed on 9 August 1989 an amended Form 1041 for the Estate of Betty O'Gilvie and a Form 1040X for himself reporting thereon a net decrease in gross income in the amounts of $4,967,292.00 and $2,283,646.00, respectively. The decrease in gross income results in the overpayment of income tax by Kelly M. O'Gilvie in his individual capacity of $695,415.00. Kelly M. O'Gilvie, in his individual capacity, requests a refund in that amount plus interest.

9. More than six (6) months have elapsed since the filing of the amended Form 1041 and the Form 1040X and the Secretary of the Treasury has not rendered a decision thereon. Plaintiff is therefore entitled to bring this action. 26 U.S.C. 6532(a).

10. Plaintiff, Kelly M. O'Gilvie, has overpaid his federal income tax in the amount of $695,415.00 which amount, together with interest as provided by law on overpayments, is due and owing to Plaintiff from Defendant.

Appendix C

11. Attached hereto is a copy of Plaintiff's 1988 Form 1040X.

12. The action of Defendant, through the Secretary of the Treasury, in refusing to refund income tax overpaid by Plaintiff was erroneous, illegal, wrongful or excessive.

13. No assignment or transfer has been made regarding any part of Plaintiff's claim.

Count II

14. Judgment was not initially entered on the full amount of the jury's verdict. The trial court reduced the jury's verdict for punitive damages and entered judgment in the amount of $1,350,000.00. *Kelly M. O'Gilvie v. International Playtex, Inc.*, 609 F.Supp. 817, 820 (D. Kan. 1985). On appeal the judgment of the trial court was reversed and the case remanded with instructions to the trial court to enter judgment in accordance with the jury's verdict. *O'Gilvie v. International Playtex*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. den.* 486 U.S. 1032, 100 L.Ed.2d 601 (1988). Judgment was entered in 1988 to include the $10,000,000.00 jury verdict.

15. The interest which accrued on the judgment in the amount of $1,350,000.00 between 1985 and 1988 and which was paid in 1988 is conceded to be gross income. The interest which was paid on the amount which the Tenth Circuit Court of Appeals ordered reinstated in accordance with the jury's verdict is gross income from the day of the entry of that judgment in 1988 until paid, but not before. This amount fits squarely into the parenthetical clause found at 26 U.S.C. 104(a)(2) and was either not gross income or was excludible from gross income.

Appendix C

16. Plaintiff filed an amended Form 1040X for himself reporting thereon a net decrease in gross income in the amount of $875,000.00. The decrease in gross income results in the additional overpayment by Kelly M. O'Gilvie of $260,437.00.

17. More than six (6) months have elapsed since the February 12, 1991 filing of the Amended Form 1040X and the Secretary of the Treasury has not rendered a decision thereon. Plaintiff is therefore entitled to bring this action. 26 U.S.C. 6532(a).

18. Plaintiff, Kelly M. O'Gilvie, has overpaid his federal income tax in the amount of $260,437.00 which amount, together with interest as provided by law on overpayments, is due and owing to Plaintiff from Defendant.

19. Attached is a copy of Plaintiff's 1988 Amended Form 1040X.

20. The action of Defendant, through the Secretary of the Treasury, in refusing to refund income tax overpaid by Plaintiff was erroneous, illegal, wrongful or excessive.

21. No assignment or transfer has been made regarding any part of Plaintiff's claim.

WHEREFORE, Plaintiff prays that judgment be entered in his favor in the amount of $695,415.00 for Count I of the Amended Complaint and $260,437.00 for Count II of this Amended Complaint, for a total of $995,852.00, together with interest as provided by law on the overpayment and the costs of this action.

Appendix C

s/ John C. King
John C. King #13827
King & King, P.A.
P.O. Box 782106
Wichita, Kansas 67278
(316) 682-3000
(316) 686-2000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of August, 1991, a true and correct copy of the above and foregoing Amended Complaint was placed in the United States mail, postage prepaid, properly addressed to:

Noreene C. Stehlik
Trial Attorney
Office of Special Litigation
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044

s/ John C. King
John C. King

Department of the Treasury—Internal Revenue Service

1040X (Rev. October 1989) (O)

Amended U.S. Individual Income Tax Return

► See separate instructions.

OMB No. 1545-0091
Expires 9-30-92

This return is for calendar year ► 19 88 , OR fiscal year ended ► , 19 .

Please print or type

Your first name and initial	Last name	Your social security number
Kelly M.	O'Gilvie	514 : 70 : 2944
If a joint return, spouse's first name and initial	Last name	Spouse's social security number
		: :
Home address (number and street). (If a P.O. box, see instructions.)	Apt. no.	Telephone number (optional)
c/o John C. King, P. O. Box 8085		(316) 686-2000
City, town or post office, state, and ZIP code. (If a foreign address, see instructions.)		For Paperwork Reduction Act Notice, see page 1 of separate instructions.
Wichita, Kansa 67208-0085		

Enter name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses from original returns.

Same

A Service center where original return was filed: Austin, Texas

B Has original return been changed or audited by IRS? . . . . ☐ Yes ☒ No
If "No," have you been notified that it will be? . . . . . ☐ Yes ☒ No
If "Yes," identify IRS office ►

C Are you amending your return to include any item (loss, credit, deduction, other tax benefit, or income) relating to a tax shelter required to be registered? . . . . . ☐ Yes ☒ No
If "Yes," you MUST attach Form 8271, Investor Reporting of Tax Shelter Registration Number.

D Filing status claimed. (Note: *You cannot change from joint to separate returns after the due date has passed.*)

On original return ► ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)
On this return ► ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)

Income and Deductions (see instructions) (Note: Be sure to complete page 2)		A. As originally reported or as adjusted (see instructions)	B. Net change—Increase or (Decrease)—explain on page 2	C. Correct amount
1 Total income	1	3,426,018.	(3,358,646.)	67,372.
2 Adjustments to income	2			
3 Adjusted gross income (subtract line 2 from line 1)	3	3,426,018.	(3,358,646.)	67,372.
4 Deductions	4	2,500.		
5 Subtract line 4 from line 3	5	3,423,518.	(3,358,646.)	64,872.
6 Exemptions	6	5,850.		5,850.
7 Taxable income (subtract line 6 from line 5)	7	3,417,668.	(3,358,646.)	59,022.
8 Tax (see instructions). (Method used in col. C .....)	8	961,065.	(946,859.)	14,206.
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10	961,065.	(946,859.)	14,206.
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 For tax year 1989, supplemental Medicare premium	12			
13 Total tax and any Medicare premium (add lines 10, 11, and 12)	13	961,065.	(946,859.)	14,206.
14 Federal income tax withheld and excess FICA and RRTA tax withheld	14	58.		58.
15 Estimated tax payments	15	720,000.		720,000.
16 Earned income credit	16			
17 Credits for Federal tax on fuels, regulated investment company, etc.	17			
18 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)	18			250,000.
19 Amount paid with original return, plus additional tax paid after it was filed	19			
20 Add lines 14 through 19 in column C	20			970,058.
Refund or Amount You Owe				
21 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)	21			
22 Subtract line 21 from line 20 (see instructions)	22			970,058.
23 **AMOUNT YOU OWE.** If line 13, col. C, is more than line 22, enter difference. Please pay in full with this return	23			
24 **REFUND** to be received. If line 13, column C, is less than line 22, enter difference	24			955,852.

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Please sign here

Your signature: Kelly M. O'Gilvie — Date: 2/1/91

Spouse's signature (if joint return, BOTH must sign) — Date

Paid preparer's use Only

Preparer's signature — Date: 2-1-91 — Check if self-employed ☐ — Preparer's social security no.

Firm's name (or yours if self-employed) and address: King & King, P.A., P. O. Box 8085, Wichita, Kansas — E.I. No. 48-1058433 — ZIP code 67208

Part I Exemptions (see Form 1040 or Form 1040A Instructions)

If you are not changing your exemptions, do not complete Part I.
If claiming more exemptions, complete lines 25–32 and, if applicable, line 33.
If claiming fewer exemptions, complete lines 25–31.

		A. Number originally reported	B. Net change	C. Correct number
5 For tax years beginning after 1986—yourself and spouse Caution: *For tax years beginning after 1986, if someone (such as your parent) can claim you as a dependent, you cannot claim an exemption for yourself.*	25			
6 For tax year 1986—yourself and spouse, 65 or older, blind	26			
7 Your dependent children who lived with you	27			
8 Your dependent children who did not live with you due to divorce or separation	28			
9 Other dependents	29			
0 Total exemptions (add lines 25 through 29)	30			
1 Multiply $2,000 ($1,950 for tax year 1988, $1,900 for tax year 1987, $1,080 for tax year 1986) by the number of exemptions claimed on line 30. Enter the result here and on page 1, line 6	31			

2 Dependents (children and other) not claimed on original return:
Note: *If amending your 1986 return, do not complete column (b) or (c) below.*

(a) Dependent's name (first, initial, and last name)	(b) Check if under age 2 (under age 5 if a 1987 or 1988 return)	(c) If age 2 or older (age 5 or older if a 1987 or 1988 return) dependent's social security number	(d) Relationship	(e) No. of months lived in your home

No. of your children on line 32 who lived with you ▶ ☐
No. of your children on line 32 who didn't live with you due to divorce or separation (see instructions) ▶ ☐
No. of other dependents listed on line 32 ▶ ☐

3 If your child listed on line 32 didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

Part II Explanation of Changes to Income, Deductions, and Credits

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback or a general business credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the instructions. Also, check here ▶ ☐

The taxpayer reported $2,483,646.00, which was his intestate share of a punitive damage award received on account of personal injury. The taxpayer contends that the amount is not taxable and should not have been included in gross income.

The taxpayer reported $948,632.00 as his intestate share of amounts received on account of personal injury and characterized as interest. The taxpayer contends that $875,000.00 of that amount is not taxable and that it should not have been included in gross income.

The award is either not income under Section 61 of the Internal Revenue Code of 1986, as amended, or is excluded from income under Section 104(a)(2) of Part III of Subchapter B, Chapter 1, Subtitle A of the Internal Revenue Code of 1986. Burford v. U.S., 642 F. Supp. 635 (1986). The $875,000.00 amount is excludible under the same reasoning as the punitive damages and in particular the fourteen (14) word parenthetical clause to Section 104(a)(2) of the Internal Revenue Code of 1986.

Part III Presidential Election Campaign Fund

Checking below will not increase your tax or reduce your refund.

If you did not previously want to have $1 go to the fund, but now want to . . . . . check here ▶ ☐
If joint return and your spouse did not previously want to have $1 go to the fund, but now wants to . . . . . check here ▶ ☐

☆ U.S.GPO:1989-243-302 E.I.43-1410166

Department of the Treasury — Internal Revenue Service

1040X — Amended U.S. Individual Income Tax Return

OMB No. 1545-0091
Expires 6-30-90

(Rev. October 1988)

This return is for calendar year ▶ 1988 , OR fiscal year ended ▶ , 19

Your first name and initial (if joint return, also give spouse's name and initial) | Last name | Your social security number
Kelly M. O'Gilvie | | 514-70-2944

Present home address (number and street, including apt. no. or rural route). (If you have a P.O. box, see instructions.) | Spouse's social security number
c\o John C. King P.O. Box 8085 | Unknown

City, town or post office, state, and ZIP code | Telephone number (optional)
Wichita, KS 67208-0085 | 316-686-2000

RECEIVED
AUG 2 1989
IRS
Wichita, Kansas

Enter below name and address as shown on original return (if same as above, write "Same"). If changing from separate to joint return, enter names and addresses used on original returns.
Note: You cannot change from joint to separate returns after the due date has passed.)

SAME

A Service center where original return was filed
Austin, Texas

B Has original return been changed or audited by IRS? ..... ☐ Yes ☒ No
If "No," have you been notified that it will be? ..... ☐ Yes ☒ No
If "Yes," identify IRS office ▶

C Are you amending your return to include any item (loss, credit, deductions, other tax benefit, or income) relating to a tax shelter required to be registered? ..... ☐ Yes ☒ No
If "Yes," you MUST attach Form 8271 Investor Reporting of Tax Shelter Registration Number.

D Filing status claimed. (Note: You cannot change from joint to separate returns after the due date has passed.)
On original return .. ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)
On this return ..... ▶ ☐ Single ☐ Married filing joint return ☒ Married filing separate return ☐ Head of household ☐ Qualifying widow(er)

Income and Deductions (see instructions)		A. As originally reported or as adjusted (see instructions)	B. Net change - increase or (decrease) - explain on page 2	C. Correct amount
1 Total income	1	3426018	-2483646	942372
2 Adjustments to income	2			
3 Adjusted gross income (subtract line 2 from line 1)	3	3426018	-2483646	942372
4 Deductions	4	2500		2500
5 Subtract line 4 from line 3	5	3423518	-2483646	939672
6 Exemptions	6	5850		5850
7 Taxable income (subtract line 6 from line 5)	7	3417668	-2483646	934022
8 Tax (see instructions). (Method used in col. C TAX RATE SCHED.)	8	961065	-695421	265644
9 Credits (see instructions)	9			
10 Subtract line 9 from line 8. Enter the result, but not less than zero	10	961065	-695421	265644
11 Other taxes (such as self-employment tax, alternative minimum tax)	11			
12 Total tax liability (add lines 10 and 11)	12	961065	-695421	265644
13 Federal income tax withheld and excess FICA and RRTA tax withheld	13	58		58
14 Estimated tax payments	14	720000		720000
15 Earned income credit	15			
16 Credit for Federal tax on fuels, regulated investment company, etc.	16			
17 Amount paid with Form 4868, Form 2688, or Form 2350 (application for extension of time to file)	17	250000		
18 Amount paid with original return, plus additional tax paid after it was filed	18			
19 Add lines 13 through 18, column C	19	$70058		
Refund or Amount You Owe				
20 Overpayment, if any, as shown on original return (or as previously adjusted by IRS)	20			
21 Subtract line 20 from line 19 (see instructions)	21	$70058		
22 AMOUNT YOU OWE. If line 12, col. C, is more than line 21, enter difference. Please pay in full with this return	22			
23 REFUND to be received. If line 12, column C, is less than line 21, enter the difference	23	704414		

Please Sign Here

Under penalties of perjury, I declare that I have filed an original return and that I have examined this amended return, including accompanying schedules and statements, and to the best of my knowledge and belief, this amended return is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

Kelly M. O'Gilvie 10-10-89
Your signature — Date

Spouse's signature (if joint return, BOTH must sign) — Date

Paid Preparer's Use Only

Preparer's signature — Date 10-10-89 — Check if self-employed ☐ — Preparer's social security no.

Firm's name (or yours if self-employed) and address: King, Kinc, P.A. Attorneys
6135 E. CENTRAL P.O. BOX 8085
WICHITA, KS

E.I. No. 48-1058433
ZIP code 67208

For Paperwork Reduction Act Notice, see page 1 of separate instructions.

BE SURE TO COMPLETE PAGE 2

Appendix C

35a

1040X (Rev. 10-88)

Page 2

Part I **Exemptions (see Form 1040 and Form 1040A instructions)**

If you are not changing your exemptions, do not complete Part I.
If claiming more exemptions, complete lines 1–6 and, if applicable, line 8.
If claiming fewer exemptions, complete lines 1–7.

		A. Number originally reported	B. Net change	C. Correct number
For tax years beginning after 1986 – yourself and spouse	1	1		1
Caution: For tax years beginning after 1986, if someone (such as your parent) can claim you as a dependent, you cannot claim an exemption for yourself.				
For tax years beginning before 1987 – yourself and spouse, 65 or over, blind	2			
Your dependent children who lived with you	3	2		2
Your dependent children who did not live with you due to divorce or separation	4			
Other dependents	5			
Total exemptions (add lines 1 through 5)	6	3		3
Multiply $1,850 ($1,800, for tax year 1987, $1,080, for tax year 1986, $1,040, for tax year 1985) by the number of exemptions claimed on line 6. Enter the result here and on page 1, line 6	7	5850		5850

Dependents (children and other) not claimed on original return:
Note: Complete column (b) or (c), whichever applies, only if amending your 1987 or 1988 return.

(a) Full name (first, initial, and last name)	(b) Check if under age 5	(c) If age 5 or over, dependent's social security number	(d) Relationship	(e) No. of months lived in your home

No. of children on 6 who lived with you ▶ ☐

No. of your children on 6 who didn't live with you due to divorce or separation (see instructions) ▶ ☐

No. of other dependents listed on 6 ▶ ☐

If your child listed on line 8 didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶ ☐

Part II **Explanation of Changes to Income, Deductions, and Credits**

Enter the line number from page 1 for each item you are changing and give the reason for each change. Attach all supporting forms and schedules for items changed. Be sure to include your name and social security number on any attachments.

If the change pertains to a net operating loss carryback, a general business credit carryback, or, for tax year 1985, a research credit carryback, attach the schedule or form that shows the year in which the loss or credit occurred. See the instructions. Also, check here ▶ ☐

The taxpayer reported $2,483,646.00, which was his intestate share of a punitive damage award received on account of personal injury. The taxpayer contends that the amount is not taxable and should not have been included in gross income.

The award is either not income under Section 61 of the Internal Revenue Code of 1986, as amended, or is excluded from income under Section 104(a)(2) of Part III of Subchapter B, Chapter 1, Subtitle A of the Internal Revenue Code of 1986. Burford v. U.S., 642 F. Supp. 635 (1986).

Part III **Presidential Election Campaign Fund**

Checking below will not increase your tax or reduce your refund.

You did not previously want $1 to go to the fund, but now want to ..... check here ▶ ☐
Joint return and spouse did not previously want $1 to go to the fund, but now wants to ..... check here ▶ ☐

Form **1041** — Department of the Treasury, Internal Revenue Service

U.S. Fiduciary Income Tax Re..

For the calendar year 1988 or fiscal year beginning , 1988, and ending , 19

OMB No 1545-0092

1988

Check applicable boxes:
- [X] Decedent's estate
- [ ] Simple trust
- [ ] Complex trust
- [ ] Grantor type trust
- [ ] Bankruptcy estate
- [ ] Family estate trust
- [ ] Pooled income fund
- [ ] Initial return
- [ ] Amended return
- [ ] Final return

Name of estate or trust (grantor type trust, see instructions): Betty O'Gilvie Estate

Employer identification number: 48-6292710

Name and title of fiduciary: O'Gilvie Kelly M. ADM

Date entity created: 2 April 1983

Address of fiduciary (number and street or P.O. Box): c/o John C. King P.O. Box 8085

Nonexempt charitable and split-interest trusts, check applicable boxes (see instructions):
- [ ] Described in section 4947(a)(1)
- [ ] Not a private foundation
- [ ] Described in section 4947(a)(2)

City, state, and ZIP code: Wichita, Kansas 67208-0085

Number of Schedules K-1 attached (See instructions) ► -

Income	1	Dividends		1
	2	Interest income		2 1 724784
	3	Income (or losses) from partnerships, other estates or other trusts (see instructions)		3
	4	Net rent and royalty income (or loss) (attach Schedule E (Form 1040))		4
	5	Net business and farm income (or loss) (attach Schedules C and F (Form 1040))		5
	6	Capital gain (or loss) (attach Schedule D (Form 1041))		6
	7	Ordinary gain (or loss) (attach Form 4797)		7
	8	Other income (state nature of income)		8
	9	Total income (add lines 1 through 8)	►	9 1,724784
Deductions	10	Interest	10	
	11	Taxes	11	
	12	Fiduciary fees	12	
	13	Charitable deduction (from Schedule A, line 6)	13	
	14	Attorney, accountant, and return preparer fees	14	
	15	Other deductions (attach schedule)	15	
	16	Total (add lines 10 through 15)	►	16
	17	Adjusted total income (or loss) (subtract line 16 from line 9)		17 1,724784
	18	Income distribution deduction (from Schedule B, line 17) (see instructions) (attach Schedule K-1 (Form 1041))		18 1,724784
	19	Estate tax deduction (including generation-skipping transfer taxes) (attach computation)		19
	20	Exemption		20 600
	21	Total (add lines 18 through 20)	►	21 1,724184
	22	Taxable income of fiduciary (subtract line 21 from line 17)	►	22 none
Please attach check or money order here. Tax and Payments	23	Total tax (enter amount from line 7, Schedule G)		23
	24a	Payments: 1988 estimated tax payments and amount applied from 1987 return		24a
	b	Treated as paid by trust beneficiaries (attach Form 1041-T)		24b
	c	Subtract line 24b from line 24a		24c
	d	Tax paid with extension of time to file ☐ Form 8736 ☐ Form 8800 ☐ Form 2758		24d
	e	Federal income tax withheld		24e
		Credits:		
	f	Form 2439 ....; g Form 4136 ....; h Form 6249		24f
	25	Total (add lines 24c through 24e, and 24f)	►	25
	26	If line 23 is larger than line 25, enter TAX DUE		26
	27	If line 25 is larger than line 23, enter OVERPAYMENT		27
	28	Amount of line 27 to be: a Credited to 1989 estimated tax ► ..... b Refunded	►	28
	29	Penalty for underpayment of estimated tax Check ☐ If Form 2210 (Form 2210F) is attached		29

Taxpayer Service Div. RECEIVED AUG 4 1988 IRS Wichita, Kansas

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than fiduciary) is based on all information of which preparer has any knowledge

Kelly M O'Gilvie ADM. — 27 July 88 — 514-70-2944

Signature of fiduciary or officer representing fiduciary — Date — EIN of fiduciary (see instructions)

Paid Preparer's Use Only

Preparer's signature — Date 27 July 88 — Check if self-employed ► ☐ — Preparer's social security no.

Firm's name (or yours if self-employed) and address: King & King, P.A. Attorneys, P.O. Box 8085, Wichita, Kansas — E.I. No ► 48 1058433 — ZIP code ► 67208-0085

For Paperwork Reduction Act Notice, see page 1 of the instructions. — Form 1041 (1988)

Schedule A Charitable Deduction—*Do not complete for a simple trust or a pooled income fund.*
(Write the name and address of each charitable organization to whom your contributions total $3,000 or more on an attached sheet.)

1	Amounts paid or permanently set aside for charitable purposes from current year's gross income	1	
2	Tax-exempt interest allocable to charitable distribution (see instructions)	2	
3	Balance (subtract line 2 from line 1)	3	
4	Enter the net short-term capital gain and the net long-term capital gain of the current tax year allocable to corpus paid or permanently set aside for charitable purposes	4	
5	Amounts paid or permanently set aside for charitable purposes from gross income of a prior year (see instructions)	5	
6	Total (add lines 3, 4, and 5). Enter here and on page 1, line 13	6	

Schedule B Income Distribution Deduction (See instructions)

1	Adjusted total income (Enter amount from page 1, line 17.) (see instructions)		1	1,724784
2	Adjusted tax-exempt interest (see instructions)		2	
3	Net gain shown on Schedule D (Form 1041), line 17, column (a) (if net loss, enter zero.)		3	
4	Enter amount from Schedule A, line 4		4	
5	Long-term capital gain included on Schedule A, line 1		5	
6	Short-term capital gain included on Schedule A, line 1		6	
7	If the amount on page 1, line 6, is a capital loss, enter here as a positive figure		7	
8	If the amount on page 1, line 6, is a capital gain, enter here as a negative figure		8	
9	Distributable net income (combine lines 1 through 8)		9	1,724784
10	Amount of income for the tax year determined under the governing instrument (accounting income)	10		
11	Amount of income required to be distributed currently (see instructions)		11	
12	Other amounts paid, credited, or otherwise required to be distributed (see instructions)		12	6,791424
13	Total distributions (add lines 11 and 12). (If greater than line 10, see instructions.)		13	6,791424
14	Enter the total amount of tax-exempt income included on line 13		14	
15	Tentative income distribution deduction (subtract line 14 from line 13)		15	6,791424
16	Tentative income distribution deduction (subtract line 2 from line 9)		16	1,724784
17	Income distribution deduction (Enter the smaller of line 15 or line 16 here and on page 1, line 18.)		17	1,724784

Schedule G Tax Computation (See instructions)

1	Tax: a Tax rate schedule ....; b Other tax .... Total ►		1c	
2a	Foreign tax credit (attach Form 1116)	2a		
b	Credit for fuel produced from a nonconventional source	2b		
c	General business credit. Check which forms are attached: ☐ Form 3800 ☐ Form 3468 ☐ Form 5884 ☐ Form 6478 ☐ Form 6765 ☐ Form 8586	2c		
d	Credit for prior year minimum tax (attach Form 8801)	2d		
3	Total (add lines 2a through 2d) ►		3	
4	Subtract line 3 from line 1c		4	
5	Recapture taxes. Check if from: ☐ Form 4255 ☐ Form 8611		5	
6	Alternative minimum tax (attach Form 8656)		6	
7	Total (add lines 4 through 6). Enter here and on line 23, page 1 ►		7	

Taxpayer Service Ctr. RECEIVED. AUG 2 1989

Other Information

		Yes	No
1	If the fiduciary's name or address has changed, enter the old information ►		
2	Did the estate or trust receive tax-exempt income? (If "Yes," attach a computation of the allocation of expenses.) Enter the amount of tax-exempt interest income ► $		
3	Did the estate or trust have any passive activity loss(es)? (If "Yes," enter the amount of any such loss(es) on Form 8582, Passive Activity Loss Limitations, to figure the allowable loss.)		
4	Did the estate or trust receive all or any part of the earnings (salary, wages, and other compensation) of any individual by reason of a contract assignment or similar arrangement?		
5	At any time during the tax year, did the estate or trust have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)? (See the instructions for exceptions and filing requirements for Form TD F 90-22.1) If "Yes," enter the name of the foreign country ►		
6	Was the estate or trust the grantor of, or transferor to, a foreign trust which existed during the current tax year, whether or not the estate or trust has any beneficial interest in it? (If "Yes," you may have to file Form 3520, 3520-A, or 926.)		
7	Check this box if this entity has filed or is required to file Form 8264, Application for Registration of a Tax Shelter ► ☐		
8	Check this box if this entity is a complex trust making the section 663(b) election ► ☐		
9	Check this box if a section 643(e)(3) election is made (attach Schedule D (Form 1041)) ► ☐		
10	Check this box if the decedent's estate has been open for more than 2 years (see instructions) ► ☐		

☆U.S. GOVERNMENT PRINTING OFFICE: 1988 220-171 E.I. 43-0787287

APPENDIX D — ANSWER TO AMENDED COMPLAINT FILED SEPTEMBER 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, the United States of America, by its undersigned attorneys, answers plaintiff's Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of plaintiff's Amended Complaint, except defendant admits that, if jurisdiction exists, it exists pursuant to 28 U.S.C. Section 1346(a)(1).

2. Defendant admits the allegations contained in paragraph 2 of plaintiff's Amended Complaint.

3. Defendant denies the allegations contained in paragraph 3 of plaintiff's Amended Complaint, except defendant admits that this suit may be prosecuted in this district pursuant to 28 U.S.C. Section 1402(a)(1).

Appendix D

4-7. Defendant admits the allegations contained in paragraphs 4-7 of plaintiff's Amended Complaint.

8. Defendant denies the allegations contained paragraph 8 of plaintiff's Amended Complaint, except defendant admits that plaintiff, Kelly M. O'Gilvie, as administrator of the Estate of Betty O'Gilvie and in his individual capacity as an intestate heir of the Estate of Betty O'Gilvie, filed on 9 August 1989 an amended 1988 federal income tax return (Form 1041) for the Estate of Betty O'Gilvie and an amended 1988 federal income tax return (Form 1040X) for himself reporting thereon a net decrease in gross income in the amounts of $4,967,292.00 and $2,483,646.00, respectively. Defendant also admits that Kelly M. O'Gilvie, in his individual capacity, request a refund of $695,415 plus interest. Defendant denies that plaintiff is entitled to a refund.

9. Defendant admits the allegations contained in paragraph 9 of plaintiff's Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of plaintiff's Amended Complaint.

11. Defendant admits that attached to plaintiff's Amended Complaint is a copy of plaintiff's 1988 Form 1040X. Defendant denies each and every allegation contained therein unless otherwise specifically admitted.

12. Defendant denies the allegations contained in paragraph 12 of plaintiff's Amended Complaint.

13. Defendant lacks information or knowledge sufficient to affirm or deny the allegations contained in paragraph 13 of plaintiff's Amended Complaint.

Appendix D

14. Defendant admits the allegations contained in paragraph 14 of plaintiff's Amended Complaint.

15. Defendant accepts the concession contained in the first sentence of paragraph 15 of plaintiff's Amended Complaint. Defendant denies the allegations contained in the second and third sentences of paragraph 15 of plaintiff's Amended Complaint.

16. Defendant admits that plaintiff filed an amended 1988 Form 1040X for himself reporting thereon a net decrease in gross income in the amount of $875,000.00, but defendant denies that plaintiff's income for 1988 was decreased by that amount. Defendant also denies that plaintiff is due an additional overpayment of $260,437.00.

17. Defendant admits the allegations contained in paragraph 17 of plaintiff's Amended Complaint.

18. Defendant denies the allegations contained in paragraph 18 of plaintiff's Amended Complaint.

19. Defendant admits that attached to plaintiff's Complaint is a copy of plaintiff's 1988 second Form 1040X. Defendant denies each and every allegation contained therein unless otherwise specifically admitted.

20. Defendant denies the allegations contained in paragraph 20 of plaintiff's Complaint.

21. Defendant lacks information or knowledge sufficient to affirm or deny the allegations contained in paragraph 21 of plaintiff's Complaint.

Appendix D

WHEREFORE, defendant, the United States of America, having answered fully, prays that plaintiff's Complaint be dismissed with prejudice and that he recover nothing; and for such other and further relief as the Court deems just and proper.

LEE THOMPSON
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing ANSWER has been made this 9th day of September 1991, by mailing a true copy thereof to:

John C. King, Esquire
King & King, P.A.
6135 E. Central
P.O. Box 782106
Wichita, Kansas 67208

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489
(FTS) 368-6489

APPENDIX E — MOTION FOR SUMMARY JUDGMENT (UNITED STATES) FILED APRIL 12, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Defendant, the United States of America, hereby moves this Court, pursuant of Fed. R. Civ. P. 56(a), for an Order granting summary judgment in favor of the United States for the reasons given in the accompanying memorandum.

LEE THOMPSON
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Office of Special Litigation
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX F — MOTION FOR SUMMARY JUDGMENT (O'GILVIE) FILED APRIL 15, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Kelly M. O'Gilvie, moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment against the Defendant, the United States of America. The grounds for this Motion, as more fully stated in Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment filed herewith, are:

1. That there is no genuine issue as to any material fact in the above-captioned case; and

2. That the Plaintiff is entitled to judgment as a matter of law based upon the record before this Court.

Appendix F

KING & KING, P.A.

s/ John C. King
John C. King #13827

s/ Linda D. King
Linda D. King #13004

6135 E. Central
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000

APPENDIX G — MOTION FOR SUMMARY JUDGMENT (O'GILVIE) FILED NOVEMBER 11, 1992

JOHN C. KING #13827
LAW OFFICE OF JOHN C. KING, LTD.
260 N. Rock Road, Suite 128
P.O. Box 782106
Wichita, Kansas 67278
(316) 682-3000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 90-1075-B

KELLY M. O'GILVIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Kelly M. O'Gilvie, moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in his favor against the Defendant, the United States of America. This motion addresses the second of two legal issues in this case. Along with the Court's memorandum and order of August 26, 1992, it resolves all of the issues between the parties.

Appendix G

The grounds for this motion, as more fully stated in Plaintiff's memorandum in support of the same, filed herewith, are that:

1. There is no genuine issue as to any material fact in the above-captioned case; and

2. The Plaintiff is entitled to judgment as a matter of law.

WHEREFORE, Plaintiff, Kelly M. O'Gilvie requests judgment in his favor in the amount of $260,437.00, in addition to the amount of $695,415.00 previously awarded, for a total of $955,852, plus interest at the rate established for overpayments under 26 U.S.C. § 6621(a)(1).

LAW OFFICE OF JOHN C. KING, LTD.

By s/ John C. King
John C. King #13827
P.O. Box 782106
Wichita, Kansas 67278
(316) 682-3000

LINDA D. KING
Attorney at Law, P.A.

By s/ Linda D. King
Linda D. King #13004
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000

Appendix G

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion For Summary Judgment was mailed, postage prepaid, this 11th day of November, 1992, to:

Noreene C. Stehlik
Office of Special Litigation
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044

s/ John C. King
John C. King

APPENDIX H — OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (UNITED STATES) FILED NOVEMBER 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

UNITED STATES' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The United States submits herewith its opposition to plaintiff's Motion for Summary Judgment. Plaintiff's motion must be denied because plaintiff has failed either to set forth or to support the facts upon which his motion relies. In the event the court resolves to reach the legal question posed in plaintiff's motion, the motion should nevertheless be denied and judgment granted to the United States as a matter of law.

ARGUMENT

Plaintiff would have this court hold that an unspecified amount of prejudgment interest (which plaintiff refers to as

"certain amounts" or "increased amount" and which he concedes "[i]n another setting . . . might be characterized as taxable interest income" (Pl. Mem. at 2, 3)) is excludable from income under Section 104(a)(2) of the Internal Revenue Code ("Code") (26 U.S.C.) as "damages received . . . on account of personal injur[y]." Plaintiff would also, apparently, have this Court hold that plaintiff is entitled to a refund of $260,437.00 in federal taxes, plus statutory interest thereon.

Plaintiff states in the body of his Memorandum that "[a]n increased amount was paid to Plaintiff in 1988, over and above his share of the jury's verdict." Pl. Mem., at 3. Plaintiff further states "[t]hat amount was calculated according to 28 U.S.C. § 1961(b) at the federal post-judgment rate." *Id.*, note 1. Plaintiff concedes (Pl. Mem. at 5-6) that a portion of the prejudgment interest he received on the damages award is includible in gross income.

1. *Plaintiff's statement of facts fails to show any receipt of interest payments.*

The party moving for summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This plaintiff has failed to do.

Plaintiff's statement of "Uncontroverted Facts" simply incorporates by reference the "Uncontroverted Facts" set forth in his Motion for Summary Judgment filed on or about April 15, 1991. See Pl. Mem., at 1. Nowhere in that statement of facts does plaintiff state either the total amount of prejudgment interest he received, or how he calculated the portion which he alleges should not be denominated "interest" for purposes of Code

Section 104(a)(2). Were this case to proceed to trial, plaintiff would be required to prove these amounts. *E.g, Lewis v. Reynolds*, 284 U.S. 281, 283 (1931) (plaintiff in refund action bears burden not only of establishing that amount of assessment is incorrect, but also of establishing correct amount of tax).

Yet in his Memorandum plaintiff not even *stated*, let alone attempted to prove, the amount of prejudgment interest he received "over and above his share of the jury's verdict." Pl. Mem. at 3. The only clue to this amount is provided by plaintiff in his Amended Complaint, where he states that he

> filed an amended Form 1040X . . . reporting thereon a net decrease in gross income in the amount of $875,000.00. The decrease in gross income results in the additional overpayment by [plaintiff] of $260,437.00.

Amended Complaint, ¶ 16. The $875,000 figure, presumably, reflects the alleged prejudgment interest on the remittitur amount of $8,650,000 from the date of the jury's verdict in 1985 until the date of entry of the judgment in 1988. The $260,437 allegedly represents the amount of tax paid on the $875,000, and is the amount of the refund sought by plaintiff in this action. Amended Complaint, ¶ 18.

The Government is not willing to accept, without more, plaintiff's bald assertion that the round figure of $875,000 represents prejudgment interest on plaintiff's share of the $8.65 million remittitur which accrued between May 24, 1985 and June 10, 1988.[1] It is obvious that this particular interest sum would not

---

1. On the final page of his Memorandum plaintiff provides the dates (Cont'd)

have been calculated separately by either plaintiffs or defendants in *O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 406 U.S. 1032 (1988), because there would have been no need to do so. The *O'Gilvie* defendants simply paid the *O'Gilvie* plaintiffs the *total* jury award ($1.525 million in actual damages and $10 million in punitive damages, *see O'Gilvie v. Playtex, supra*), plus a *total* amount of interest, based on the $11.525 million in principal.

Until plaintiff is prepared to provide proof as to the amount of interest he alleges is excludable under Code Section 104(a)(2), and the correct amount of tax thereon, plaintiff's Motion for Summary Judgment must be denied because material facts are in dispute. And, as shown below, plaintiff's motion must also be denied because the interest income he received is not excludable from income.

2. *Interest awarded under 28 U.S.C. Section 1961 is not excludable from income under Code Section 104(a)(2).*

Interest is specifically includible in gross income. 26 U.S.C.

(Cont'd)
("[f]rom May 24, 1985 through June 10, 1988) between which the prejudgment interest which he would have this court hold is excludable from income was allegedly calculated. May 24, 1985 is the day the district court in *O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985) ordered a remittitur; and June 10, 1988 is the day the district court entered judgment in accordance with the mandate of the Tenth Circuit, which reversed the remittitur and ordered judgment entered in accordance with the jury's verdict. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The Government is willing to accept that the actions described took place on those two dates in 1985 and 1988, based on the published decisions and on its own examination of the docket sheet in *O'Gilvie v. International Playtex, Inc.*, 83-1846 (D. Kan.).

Section 61(a)(4). Interest income on nontaxable receipts is also taxable under Section 61. Treas. Reg. § 1.61-7(a). Plaintiff has stated that the post-verdict, prejudgment interest he received on the $8.65 million was calculated according to 28 U.S.C Section 1961(b). Pl. Mem. at 3, note 1. That section plainly denominates the payments received thereunder as "interest." Such payments are therefore includible in income, under Code Section 61(a)(4).

Including all post-verdict, prejudgment interest in income is also logically correct, regardless of whether the punitive damages award itself is included in income. The jury awarded plaintiff *damages*, based on the specific facts it found in the case. The *interest* plaintiff received arose only because of the delay between the date of the verdict and the date of entry of judgment.

This is also the conclusion of the only known case to have considered the question. In *Aames v. Commissioner*, 94 T.C. 189 (1990), the petitioner had received a malpractice award, together with interest thereon, in a state-court suit. After the decision was affirmed on appeal, the state court awarded petitioner prejudgment interest, from the date of the jury verdict to the date the judgment was affirmed on appeal. *Id.*, at 39,100. Petitioner did not report any of the prejudgment interest on his federal income tax return.

Petitioner Aames contended that the prejudgment interest should be considered an item of damages and therefore excludable from income pursuant to Code Section 104(a)(2). The court, noting that "[i]nterest awarded in a judgment is generally considered ordinary income, regardless of how the judgment itself is taxed," *id.*, at 39101 (citing *Wheeler v. Commissioner*, 58 T.C. 459, 461-62 (1972)), rejected plaintiff's argument. The court held that

> [t]he nature of interest is that it is paid because of delay in the receipt of funds, in this case the principal amount awarded to plaintiff and designated 'damages' by the [state] court. As interest, it is taxable to petitioner. . . . [and] must be included in petitioner's taxable income.

Id., at 39,102. The identical analysis applies here.

A similar reasoning underlies the well settled proposition that prejudgment interest paid in just compensation cases is taxable as ordinary, not capital, income. See, *e.g.*, *Kieselbach v. Commissioner*, 317 U.S. 399, 403 (1943). As the Supreme Court explained, the interest

> was paid because of the failure to put the award in the taxpayers' hands on the day . . . the property was taken. . . . It is income . . . paid to the taxpayer in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken.

* * *

> While without [the interest] payment, just compensation would not be received by the vendor, it does not follow that the additional payments are part of the sale price. . . . [J]ust compensation . . . is not the same thing as the sale price of a capital asset.

Id., at 403-04. *Kieselbach* remains good law. *See, e.g., Drayton v. United States*, 801 F.2d 117 (3d Cir. 1986) (holding *Kieselbach* mandated that interest portion of certificates paid to compensate shareholders be treated as ordinary, not capital, income). Although the question here is whether interest is income at all, not, as in Kieselbach, whether interest is capital or ordinary income, the case is still highly relevant. By treating interest as ordinary income, the *Kieselbach* court is expressly distinguishing the nature of interest paid on an award from the nature of the award itself.

Plaintiff's attempt to analogize the interest payments he received to periodic payments, which are excluded under Section 104(a)(2), is unavailing. That section merely permits the exclusion from gross income of "the amount of any damages received (whether by suit or agreement and whether as lump sums *or as periodic payments*) on account of personal injuries or sickness." 26 U.S.C. Section 104(a)(2). Nowhere does that section state or imply that any explicitly stated interest component of a damages award is excludable from income.

Plaintiff also tries to argue that, because the amount of his share of the punitive damages award "was not fixed and unconditional" until the court of appeals rendered its decision (Pl. Mem. at 3-4), the portion of the prejudgment interest at issue should therefore be excluded from gross income. This argument sweeps too broadly, however; it encompasses all prejudgment interest received by plaintiff (that is, the post-verdict, pre-remittitur interest, which plaintiff acknowledges is includible in income; as well as the post-remittitur prejudgment interest, which plaintiff is here contending is not includible in income). Such an argument can therefore have no special relevance to the post-remittitur prejudgment interest at issue.

Plaintiff also errs in arguing the interest was paid "[]n the absence of an unconditional, enforceable obligation to pay a principal sum." (Pl. Mem., at 4.) The interest was ordered to be paid by the Court of Appeals in the same order directing that judgment be entered in accordance with the jury's verdict. (Pl. Mem., at 4.) Thus, by the time the interest was ordered to be paid, plaintiff's share of the remittitur amount *was* fixed, unconditional, and enforceable.

In short, there is no reason that the interest received by plaintiff should be excluded from income. It should be treated no differently than the interest plaintiff earns on any private investment — fully taxable.

CONCLUSION

For the reasons given above, plaintiff's motion for summary judgment should be denied. If the court denies plaintiff's motion on the legal ground that interest income at issue is properly includible in income, then summary judgment should properly be entered in favor of the United States.

LEE THOMPSON
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-C

KELLY M. O'GILVIE

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing UNITED STATES' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT has been made this 30th day of November 1992, by mailing a true copy thereof to:

John C. King, Esquire
King & King, P.A.
P.O. Box 782106
Wichita, Kansas 67278

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX I — NOTICE OF APPEAL (O'GILVIE) FILED JANUARY 5, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 90-1075-MLB

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Kelly M. O'Gilvie, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment Order entered in this action on the 5th day of January, 1994.

Respectfully submitted,

s/ Linda D. King
LINDA D. KING
Attorney-at-law
6135 E. Central
Wichita, KS 67208
(316) 686-2000

APPENDIX J — NOTICE OF APPEAL (UNITED STATES) FILED FEBRUARY 1, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 90-1075-MLB

KELLY M. O'GILVIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from that portion of the Judgment Order entered in this action on the 7th day of December, 1993 which grants the motion for reconsideration and for summary judgment filed by plaintiff.

Respectfully submitted,

RANDY RATHBURN
United States Attorney

Appendix J

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
U.S. Dep't of Justice
Tax Division
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX K — COMPLAINT FILED JULY 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 92-1358-K

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

COMPLAINT

The United States of America, for its Complaint against defendants, alleges as follows:

1. This is a civil action brought by the United States of America pursuant to Section 7405 of the Internal Revenue Code (26 U.S.C.) ("the Code") to recover an erroneous income tax refund, plus interest, that was refunded to the defendant taxpayers Kevin M. O'Gilvie and Stephanie L. O'Gilvie for the taxable year 1988.

2. This action has been authorized and sanctioned by a delegate of the Secretary of the Treasury, and commenced at the direction of the Attorney General of the United States, pursuant to Section 7401 of the Code.

Appendix K

3. This Court has jurisdiction over this action pursuant to Code Section 7402(a) and 28 U.S.C. Sections 1340 and 1345.

4. Venue is proper in this judicial district under 28 U.S.C. Section 1396.

5. Defendant Kevin M. O'Gilvie resides in Benton, Kansas, within the federal judicial district of Kansas.

6. Defendant Stephanie L. O'Gilvie resides in Benton, Kansas, within the federal judicial district of Kansas.

7. Defendant Kevin M. O'Gilvie timely filed an individual federal income tax return for the tax year 1988 which reported as income $1,241,823.00 (one million, two hundred forty-one thousand, eight hundred twenty three dollars) received from the estate of Betty O'Gilvie.

8. Defendant Stephanie L. O'Gilvie timely filed an individual federal income tax return for the tax year 1988 which reported as income $1,241,823.00 (one million, two hundred forty-one thousand, eight hundred twenty three dollars) received from the estate of Betty O'Gilvie.

9. Defendant Kevin M. O'Gilvie on November 17, 1989 timely filed an amended individual federal income tax return for the tax year 1988 requesting a refund of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars), plus interest.

10. Defendant Stephanie L. O'Gilvie on November 17, 1989 timely filed an amended individual federal income tax return for the tax year 1988 requesting a refund of $346,319

(three hundred forty-six thousand, three hundred nineteen dollars), plus interest.

11. On July 9, 1990, the Internal Revenue Service refunded to Kevin M. O'Gilvie the sum of $392,160.37 (three hundred ninety-two thousand, one hundred sixty dollars and thirty-seven cents), consisting of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars) in tax and $45,841.37 (forty-five thousand, eight hundred forty-one dollars and thirty-seven cents).

12. On July 9, 1990, the Internal Revenue Service refunded to Stephanie L. O'Gilvie the sum of $392,160.37 (three hundred ninety-two thousand, one hundred sixty dollars and thirty-seven cents), consisting of $346,319 (three hundred forty-six thousand, three hundred nineteen dollars) in tax and $45,841.37 (forty-five thousand, eight hundred forty-one dollars and thirty-seven cents).

13. The Internal Revenue Service has determined that the refunds issued to Kevin M. O'Gilvie and Stephanie L. O'Gilvie and described in paragraphs 11 and 12 above were erroneous.

WHEREFORE, plaintiff, the United States of America, prays that this Court grant

(1) judgment in favor of the United States against Kevin M. O'Gilvie in the amount of $392,160.37, plus accrued interest as allowed by law;

(2) judgment in favor of the United States against Stephanie L. O'Gilvie in the amount of $392,160.37, plus accrued interest as allowed by law;

(3) such other and further relief as it deems just and proper, including the costs of this action.

REQUEST FOR PLACE OF TRIAL

The United States requests that trial of this matter be held in Wichita, Kansas.

LEE THOMPSON
United States Attorney

s/ Rachel D. Cramer
NOREENE C. STEHLIK
RACHEL D. CRAMER
Trial Attorneys
Tax Division
Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6540

APPENDIX L — ANSWER FILED SEPTEMBER 10, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

ANSWER TO COMPLAINT

Defendants, pursuant to order of the court, answer the plaintiff's complaint as follows:

1. The defendants admit the allegations contained in paragraphs 1, 2 and 3 of plaintiff's complaint.

2. The defendants admit the allegations contained in paragraphs 4, 5 and 6 of plaintiff's complaint.

3. The defendants admit the allegations contained in paragraphs 7, 8, 9, 10, 11 and 12 of plaintiff's complaint.

4. The defendants deny the legal conclusion drawn by plaintiff contained in paragraph 13 of plaintiff's complaint.

Appendix L

Wherefore, defendants demand that plaintiff take nothing by its complaint.

s/ Linda D. King
LINDA D. KING
Attorney for Defendant 6135
E. Central
Wichita, Kansas 67208

CERTIFICATE OF SERVICE

IT IS hereby certified that on the 25th day of August, 1993 a true and correct copy of the above and foregoing **Answer to Complaint** was placed in the U.S. mail, postage prepaid, properly addressed to:

VIA FAX 202-514-6770
Noreene Stehlik
Tax Division
Office of Special Litigation
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044

Emily Metzger
1200 Epic Center
301 N. Main
Wichita, Kansas 67202

By s/ Linda D. King
LINDA D. KING #13004
Attorney for Defendants

APPENDIX M — ORDER FILED FEBRUARY 22, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED, pursuant to the Stipulation and Order filed August 20, 1993, in which the parties agreed to be bound by the final judgment of the district court in *Kelly O'Gilvie v. United States*, Civil No. 90-1075-B (D. Kan.) (subject to the provisions contained in paragraphs 13 and 14 of the Stipulation and Order which preserves the rights of the parties to appeal any adverse determination of the merits), that plaintiff, the United States of America, shall take nothing on its complaint against defendants Kevin M. O'Gilvie and Stephanie L. O'Gilvie, and that the action be dismissed on the merits.

Dated: February __, 1994.

s/ Monti L. Belot
THE HONORABLE MONTI L. BELOT
UNITED STATES DISTRICT JUDGE

Appendix M

Agreed as to form:

s/ Linda D. King
Linda King, Esquire
6135 East Central
P.O. Box 8085
Wichita, Kansas 67208
(316) 686-2000
Attorney for Defendants

s/ Noreene C. Stehlik
Noreene C. Stehlik
U.S. Department of Justice
Tax Division
P.O. Box 7238
Washington, D.C. 20044
(202) 514-6489
Attorney for United States

APPENDIX N — NOTICE OF APPEAL FILED MARCH 4, 1994

UNITED STATED DISTRICT COURT
DISTRICT OF KANSAS

Civil No. 92-1358-MLB

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order entered in this action on the 22d day of February, 1994, which holds that the United States of America shall take nothing on its complaint against defendants Kevin M. O'Gilvie And Stephanie L. O'Gilvie.

Appendix N

Respectfully submitted,

RANDY RATHBURN
United States Attorney

s/ Noreene C. Stehlik
NOREENE C. STEHLIK
Trial Attorney
U.S. Dep't of Justice
Tax Division
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489

APPENDIX O — IRS LETTER DENYING REFUND DATED SEPTEMBER 16, 1991

Internal Revenue Service Department of the Treasury
District Director

Social Security or
Employer Identification Number:
514-70-2944
Kind of Tax:
Income
Document Locator Number:
N/A
Tax Period Ended:
December 31, 1988
Amount Claimed:
$955.852 [sic]
Date Claim Received:
March 12, 1991
Person to Contact:
M. Borst
Contact Telephone Number:
(316) 291-6409

Date: SEP 16 1991

Kelly M. Ogilvie
P.O. Box 8085
Wichita, KS 67208

CERTIFIED MAIL

Dear Taxpayer:

We are sorry, but we cannot allow your claim for an

Appendix O

adjustment to your tax, for the reasons stated below. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Claims Court. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

s/ Bruce R. Thomas
Bruce R. Thomas
District Director

Reasons for disallowance:

We are disallowing your claim as requested in the letter of John C. King dated February 12, 1991.

cc: Linda D. King

412 S. Main St.
Wichita, Kansas 67202

Letter 906 (DO) (Rev. 11-82)

APPENDIX P — LETTER FROM IRS TO KEVIN O'GILVIE PROPOSING TO JOINT COMMITTEE APPROVAL OF 1988 TAX RETURNS DATED MAY 2, 1990

Internal Revenue Service **Department of the Treasury**

412 S. Main St.
Wichita, Kansas 67202

Kevin M. Ogilive, Minor
% R. Pitts First National Bank
P.O. Box 1
Wichita, Kansas 67201-5000

Person to Contact:
Gail C. Woodberry
Telephone Number:
(316) 291-6603
Refer Reply to:
E:ESP:GCW:Stop 4300-WIC J/C
Date: May 2, 1990

Tax Periods: December 31, 1988

Gentlemen:

The Internal Revenue Service has proposed to the Joint Committee on Taxation that your income tax returns or amended returns, or application for tentative allowance for the above periods be accepted as filed or as previously adjusted by tentative allowances, as appropriate. As the action propose by the Service is subject to approval by the Joint Committee, this letter does not constitute an "accepted without examination" notification.

We will let you know when the Joint Committee has completed its consideration of your case. If you have any questions, please contact the person whose name and telephone number are shown above.

Appendix P

Sincerely,

s/ Bruce R. Thomas
Bruce R. Thomas
District Director

s/ Cindy Zimmerman
by Cindy Zimmerman
Chief, Examination Support and Processing Branch

APPENDIX Q — LETTER FROM IRS TO CHAIRMAN OF JOINT COMMITTEE APPROVING REFUND DATED APRIL 13, 1990

Internal Revenue Service Department of the Treasury

District Director
1100 Commerce St.,
Dallas, Texas 75242

Date: APR 13 1990

DAL:E:SM
Examination — Dallas
Susan Monroe FTS 729-1482

EXPEDITE REFUND REQUEST REPORT

The Chairman
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with the provisions of section 6405 of the Internal Revenue Code of 1986, there are reported the following refunds or credits of income tax for which a supplemental report is not required to be submitted.

Appendix Q

2. Kevin M. O'Gilvie Year: 8812
Wichita, Kansas (TCH)
Related Cases: Stephanie L. O'Gilvie

Refunds or Credits

Section 6405(a)	$346,319
Section 6405(b)	-0-
Total	$346,319

Survey activity: full

The taxpayer filed an amended return to remove punitive damages included in taxable income on his original return. The punitive damages were received for pain and suffering and the wrongful death of his mother.

The above overassessments are approved.

Sincerely,

s/ Gary O. Booth
Gary O. Booth
District Director

APPENDIX R — LETTER FROM JOINT COMMITTEE TO HONORABLE FRED T. GOLDBERG, COMMISSIONER OF INTERNAL REVENUE DATED MAY 3, 1990

CONGRESS OF THE UNITED STATES
JOINT COMMITTEE ON TAXATION
1015 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6453
(202) 225-3621

MAY -3 1990

Honorable Fred T. Goldberg
Commissioner of Internal Revenue
Washington, D.C. 20224

Attention: Quality Section — EX:Q:Q

Dear Mr. Goldberg:

Receipt is hereby acknowledged of reports submitted pursuant to the provisions of section 6405 of the Internal Revenue Code of 1986, by the Internal Revenue Service regarding refunds in favor of the following taxpayers:

Kevin M. O'Gilvie, Wichita, Kansas

Members of the Committee staff have examined these reports, which were submitted in abbreviated form. They have reported to me that the reports disclose no basis for recommending reconsideration by the Internal Revenue Service of any of the matters contained therein. It is my opinion, therefore, that having complied with the intent of section 6405,

Appendix R

you should proceed with the disposition of these cases as proposed in the reports submitted.

Sincerely yours,

s/ Mary M. Schmitt
Mary M. Schmitt

APPENDIX S — LETTER FROM IRS TO KEVIN O'GILVIE ALLOWING REFUND DATED JUNE 6, 1990

Internal Revenue Service **Department of the Treasury**

412 S. Main St.
Wichita, Kansas 67202

Kevin M. O'Gilvie, Minor
c/o R. Pitts, First National Bank
Wichita, Kansas 67201-5000

Person to Contact:
Stephen J. Glotzbach
Telephone Number:
(316) 291-6570
Refer Reply to:
E:QAS:SG:Stop 4020-WIC
Date: JUN 6, 1990

Tax Periods: Tax Year Ending 12-31-88

Dear Mr. O'Gilvie:

The Joint Committee on Taxation has taken no exception to the conclusions the Internal Revenue Service reached regarding your income tax returns for the above periods.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely,

s/ Bruce R. Thomas
Bruce R. Thomas
District Director

s/ Carol A. Ebel
by Carol A. Ebel
Chief, Quality Review Staff

TOTAL $ .. 45 420.0

:101000291: ⑈ 02 8298 7 ⑈ ⑈000184200

United States Treasury 1541/000 A 211,303,615

Check No.

07 06 90 3 AUSTIN, TEXAS 2216 34463738

509-86-8895 I2 8Q E OGIL AUSTIN 48 TAX REF

Pay to the order of

STEPHANIE L OGILVIE MINOR
R PITTS 1ST NATIONAL BANK
PO BOX 1
WICHITA KS 67201

38 12/88

$*392160*37

VOID AFTER ONE YEAR

INT 45841.37

⑈22165⑈ :000000518: 34463738⑈ 040790 ⑈00392160377

United States Treasury 1541/000 A 211,303,616

Check No.

07 06 90 63 AUSTIN, TEXAS 2216 34463739

509-86-8943 I2 8Q E OGIL AUSTIN 48 TAX REF

Pay to the order of

KEVIN M OGILVIE MINOR
X R PITTS FIRST NATIONAL BANK
PO BOX 1
WICHITA KS 67201

39 12/88

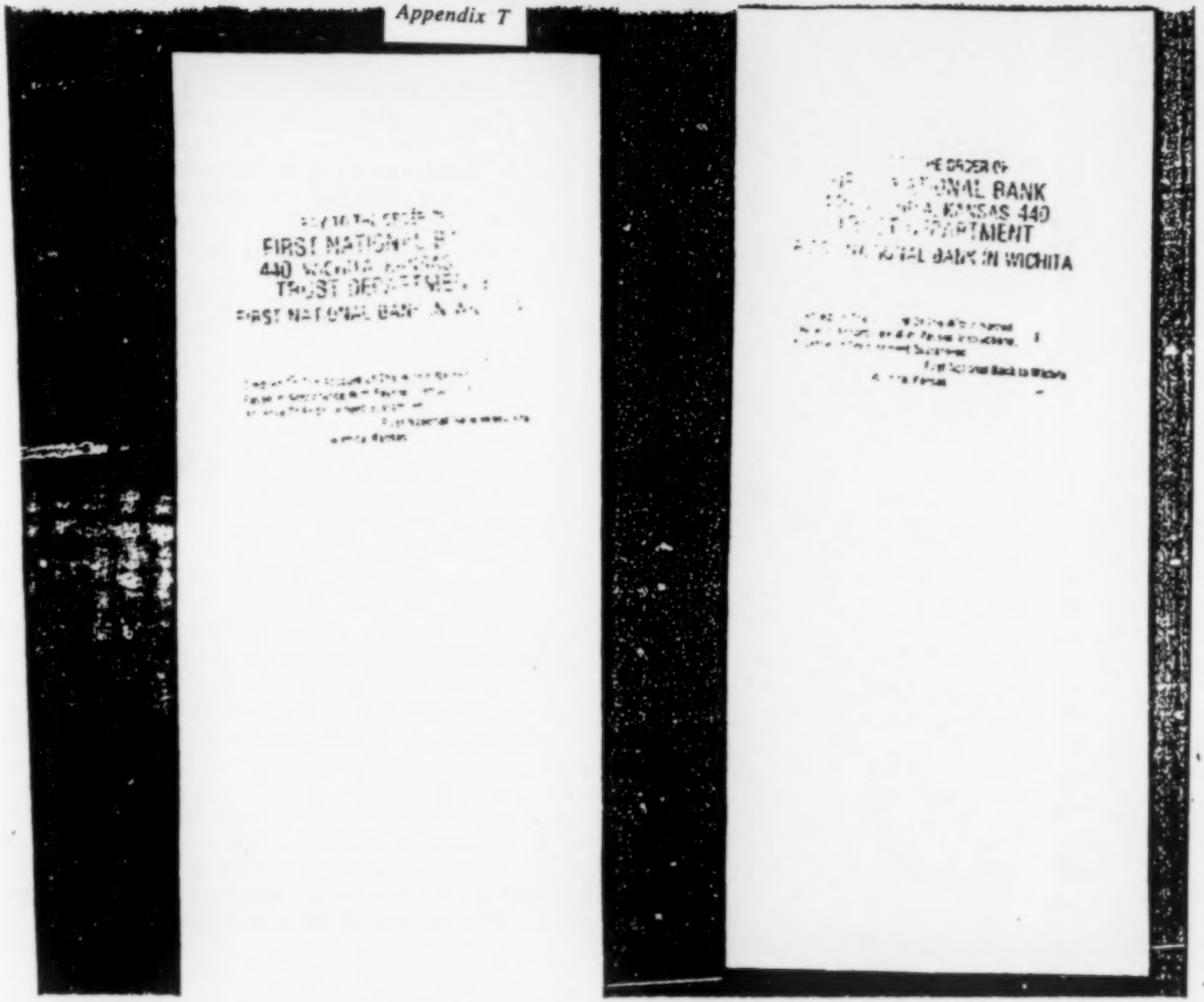
$*392160*37

VOID AFTER ONE YEAR

INT 45841.37

⑈22165⑈ :000000518: 34463739⑈ 040790 ⑈00392160377

Appendix T


FIRST NATIONAL BANK
TRUST DEPARTMENT
FIRST NATIONAL BANK IN WICHITA

APPENDIX U — SUPERSEDEAS BOND FILED JANUARY 15, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 83-1846

KELLY M. O'Gilvie, et al.,

Plaintiffs,

vs.

INTERNATIONAL PLAYTEX, INC.

Defendant.

SUPERSEDEAS BOND

WHEREAS, in the above-entitled court and cause, a judgment was rendered on the 26th day of February, 1985, in the amount of $11,225,000, with interest thereon at the rate of 9.17 percent per annum from the date of judgment; for which payment well and truly to be made, International Playtex, Inc. is bound by this instrument; and

WHEREAS, International Playtex, Inc. intends to prosecute proceedings to reverse, vacate, or modify said judgment, and International Playtex, Inc. has been granted a stay of execution by statute until midnight March 8, 1985, or until Supersedeas Bond is filed pending the final determination of said appeal.

Appendix U

NOW, THEREFORE, International Playtex, Inc., as principal and as surety, hereby undertakes to Kelly M. O'Gilvie in the penal sum of $12,725,000, as required by the Court, that International Playtex, Inc. will pay the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.

The condition of this obligation is that if International Playtex, Inc., defendant, shall prosecute its post-trial motions to disposition and shall satisfy or supersede, or cause to be superseded, any judgment in full, together with costs, interest and damages for delay if the defendant's post-trial motions are denied, this obligation shall be void; otherwise, it shall remain in full force and effect.

International Playtex, Inc. hereby submits to the jurisdiction of the United States District Court for the District of Kansas and irrevocably appoints the Clerk thereof as its agent upon whom any papers affecting the liability on this obligation may be served.

INTERNATIONAL PLAYTEX, INC.

By s/ Hercules P. Sotos
Hercules P. Sotos, President
Principal and "Surety"

Appendix U

ATTEST:

By s/ Melvin L. Ortner
Assistant Secretary

APPROVED:

s/ Patrick F. Kelly
Patrick F. Kelly
U.S. District Judge

DATED: 1-15-88